United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4147

"Original"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AAACON AUTO TRANSPORT, INC.,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of Orders
of the Interstate Commerce Commission

JOINT BRIEF OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

B. Statutes

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AAACON AUTO TRANSPORT, INC., Petitioner,	)	
v.	)	No. 76-4147
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QUESTIONS PRESENTED

1. Whether the issuance of the order requiring AAACon to cease and desist from all of the practices found in the Commission's report to be unjust and unreasonable in violation of Sections 20(11), 219, and 216(b) of the Interstate Commerce Act was based upon adequate findings, supported by substantial evidence, and in accordance with the applicable law.

2. Whether the Commission's finding that the certificate of public convenience and necessity issued to petitioner under review did not authorize the transportation of autos to automobile dealers was clearly erroneous.

3. Whether the Commission's conclusion that Auto Trip USA, Inc., had failed to carry its burden of proving that it was "qualified" to receive certain freight forwarder authority is based upon adequate findings and supported by substantial evidence.

STATUTES PRIMARILY INVOLVED

Section 208(a) of the Interstate Commerce Act, 49 U.S.C. §308(a), provides that the terms, conditions and limitations of a motor common carrier's authority are to be set forth in its certificate as follows:

> Any certificate issued under section 206 or 207 shall specify the service . . . and the routes . . . the motor carrier is authorized to operate . . .

Section 206(a)(1) of the Interstate Commerce Act, 49 U.S.C. §306(a)(1) makes it unlawful to conduct unauthorized operations as follows:

> * * * [N]o common carrier by motor vehicle . . . shall engage in any interstate operation on any public highway . . . unless there is in force . . . a certificate of public convenience and necessity issued by the Commission authorizing such operation . . .

Section 204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c) authorizes the Commission to institute investigations into allegations of unauthorized operations as follows:

> . . . upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith . . .

Section 212(a) of the Interstate Commerce Act, 49 U.S.C. §312(a), authorizes the Commission to revoke certificates of public convenience and necessity as follows:

> Certificates, . . . shall be effective from the date specified therein, and shall remain in effect until suspended . . . Any such certificate . . . may . . . on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, . . . for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: * * *

Section 410(c) of the Interstate Commerce Act, 49 U.S.C. §1010(c), provides in pertinent part that the Commission shall issue a freight forwarder permit under the following circumstances:

> (c) The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and

that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied.

STATEMENT OF THE CASE

This is an action to set aside and annul a decision and order of the Interstate Commerce Commission entered in: Docket No. MC-C-7287, AAACon Auto Transport, Inc. - Investigation and Revocation of Certificate; Docket No. MC-C-7287 (Sub-No. 1), AAACon Auto Transport, Inc. - Petition for Declaratory Order; and Docket No. FF-359, Auto Trip U.S.A., Inc. - Freight Forwarder Application - New York, New York on April 7, 1976, 124 M.C.C. 493 (1976), (R.A., 1793).

On December 11, 1968, AAACon filed an application under Section 410 of the Act for a freight forwarder permit in Docket No. FF-359. The petitioner sought to transport used passenger automobiles, with or without baggage, personal effects and used sporting equipment, between points in the United States. By order entered August 25, 1970 (336 I.C.C. 570 (1970)), the Commission's Division 1 granted, with some restrictions, AAACon's application. The Division, however, then reopened the proceeding on the issue of AAACon's fitness by order entered May 4, 1971, and directed that it be handled on a consolidated record with the proceeding in Docket No. MC-C-7287. The Commission further directed the Commission's Bureau of Enforcement to participate in Docket No. FF-359.

By order entered March 18, 1971, in Docket No. MC-C-7287 the Commission, on its own motion, inst-tuted an investigation pursuant to Section 204(c) and 212(a) of the

Interstate Commerce Act (Act) into the motor carrier operations and practices of the petitioner, AAACon Auto Transport, Inc. (AAACon), in order to determine: 1) whether AAACon had been and was performing operations not authorized by its certificate of public convenience and necessity issued in Docket No. MC-125808 (Sub-No. 1) in violation of Section 206(a) of the Act and the terms, conditions and limitations of its certificate; and 2) whether AAACon had been and was engaging in unjust and unreasonable practices in connection with matters relating to the transportation of automobiles, in driveaway service, in violation of section 216(b) and section 219 and 20(11) of the Act. The Commission's Bureau of Enforcement was also directed to participate in the proceeding.

Shortly after the complaint proceeding was instituted AAACon filed a petition for a declaratory order on June 21, 1971, in Docket No. MC-C-7287 (Sub-No. 1) seeking clarification of a restriction in its Sub-No. 1 certificate which prohibited AAACon from transporting automobiles to auto dealers. The Commission's Division 1, by order entered July 8, 1971, designated AAACon's petition for oral hearing on a consolidated record with Docket No. MC-C-7287.

A hearing was subsequently held on a consolidated record in the three proceedings at which time twelve carriers, the Department of Defense and the Bureau of Enforcement appeared as

protestants and/or intervenors (R.A., 1795). After hearing and thoroughly evaluating the testimony of all the witnesses and other evidence of record - including the testimony of some 23 AAACon shippers - the Administrative Law Judge:

1) Recommended that a cease and desist order be entered requiring AAACon to cease and desist from the following activities (R.A. 1561-1562):

a) utilizing bills of lading which incorporated unreasonable provisions and which incorporated provisons which were at variance with those of the Uniform Bill of Lading filed with the Commission as a portion of its tariff -- specifically, any provision of any bill of lading which provided for compulsory arbitration of loss, damage or injury claims in New York City, subject to the laws of New York State, or any similar revenue-limiting provision.

b) imposing policies which negated its common carrier responsibility for the property it transported, including the assumption of liability for the full and actual loss or damage to the property as required by sections 219 and 20(11) of the Act.

c) not promptly and thoroughly investigating and processing claims. The order further provided that AAACon make and keep detailed records of the results of these investigations.

d) arbitrarily denying claims when the facts available to it were inconsistent with denial.

e) attempting to impose responsibility on its shippers' insurance carriers for loss of or damage to property it transported.

f) advertising that it insured for liability in any amount unless it disclosed to prospective shippers the precise kind and type of insurance carried, including deductible amounts, or that it bonded its drivers, unless it made clear the type, kind and manner of protection.

g) employing casual drivers without thoroughly investigating and screening them. The order further required AAACon to make and keep detailed records of these investigations.

h) not properly instructing and controlling its drivers resulting in the abuse of the vehicles entrusted to their care.

i) misrepresenting the identity of the officers, agents or employees with whom the shippers deal on claim matters.

j) performing any unauthorized transportation services to automobile dealers.

2) Denied AAACon's petition for a declaratory order.

3) Denied Auto Trip's freight forwarder application for lack of fitness on Auto Trip's part.

In addition to filing a pleading containing 756 pages of exceptions to the ALJ's decision - the filing of which the Commission found to be "inexcusable" - the petitioner also filed several petitions for leave to reopen the record to adduce additional evidence. After thoroughly considering all of the evidence and pleadings submitted by the parties the Commission essentially affirmed the ALJ's decision in all material respects and:

1) Found in No. MC-C-7287 that petitioner had been engaged in unjust and unreasonable practices in connection with matters relating to the transportation of automobiles, in driveaway service in violation of sections 20(11), 219 and 216(b) of the Interstate Commerce Act (Act), and had performed operations not authorized by its certificate in violation of section 206(a) of the Act and the terms, conditions and limitations of its certificate. Thus, it concluded that an appropriate cease and desist order should be entered.

2) Found in No. MC-C-7287 (Sub-No. 1) that the restriction contained in petitioner's Sub-No. 1 certificate restricting the authority contained therein against the transportation of traffic to automobile dealers was clear and unambiguous, served a useful purpose and, thus denied the relief requested by petitioner.

3) Found in FF-359 that Auto Trip USA, Inc., had failed to establish it was a qualified applicant or that its proposed operation would be consistent with the public interest and the national transportation policy. Therefore, the application was denied.

AAACon then filed a petition for reconsideration of the April 7, 1976, order and a petition to reopen the proceeding to receive additional evidence. Division 1, Acting as an Appellate Division, however, denied the petition for reconsideration and rejected the petition to reopen because the findings of Division 1 were in accordance with the evidence and applicable law, and no sufficient or proper cause appeared to reopen the proceeding for reconsideration.

As the Commission's order fixed the statutory effective and compliance date of its order as June 1, 1976 - later extended to August 3, 1976 - the petitioner filed a petition for judicial review and motion for stay pending review with this Court on June 18, 1976. AAACon's motion was denied by order entered July 20, 1976. Accordingly, on August 3, 1976, the petitioner filed a certificate of compliance notifying the Commission, by affidavit, of the extent of its compliance with the Commission's cease and desist order.

INTRODUCTION

AAACon attempts to portray this case as one where the Interstate Commerce Commission arbitrarily and capriciously: 1) found it to be engaged in unjust and unreasonable transportation practices; and 2) denied Auto Trip U.S.A., Inc.'s freight forwarder application even though it was a deserving carrier. To the contrary, the extensive record developed in this proceeding establishes beyond question that AAACon's practices were far from reasonable and its subsidiary was not qualified to receive the applied for authority. Rather, the evidence of record overwhelmingly supports the conclusion that in its quest to expand its business and increase profits - at whatever cost and at whoever's expense - AAACon has flagrantly and persistently violated the provisions of the Interstate Commerce Act, the Commission's regulations promulgated thereunder and otherwise has acted in an improper manner. As the Commission properly stated, petitioner's lack of interest and concern for the interests of its customers - "bordering an almost total indifference" - was ". . . clear evidence . . . that AAACon's actions in the past have been inconsistent with its common carrier obligations to provide a responsive service to its customers." (R.A., 1804). Consequently, any adverse impact suffered by AAACon as a result of the Commission's actions stems from petitioner's own actions and is not the product of arbitrary or capricious treatment by the Commission.

ARGUMENT

I.

THE COMMISSION'S CONCLUSION THAT AAACON WAS ENGAGED IN UNJUST AND UNREASONABLE TRANSPORTATION PRACTICES RELATING TO AUTOMOBILES IN DRIVEAWAY SERVICE WAS ENTIRELY PROPER.

While it is difficult to discern the specific assignments of error imparted to the Commission by the petitioner in its brief, it appears that AAACon's primary contention is that the Commission's finding that it has been engaged in unjust and unreasonable practices in connection with matters relating to the transportation of automobiles in driveaway service is erroneous since the finding is not supported by any substantial evidence. We further perceive AAACon to contend that as a direct result of the Commission's finding with regard to petitioner's past activities, the Commission improperly: 1) imposed certain requirements, restrictions and limitations on its operations; 2) denied its petition for a declaratory order as to the proper extent of its authority; and 3) denied its subsidiary's application for a freight forwarder permit. We submit, on the other hand, that since the Commission's decision was based on substantial evidence of record and was in accordance with the applicable law, there is absolutely no merit to the petitioner's claim.

In view of the fact that the propriety of the Commission's action in each proceeding embraced by the April 7, 1976,

depends on the substantiality of the evidence adduced in the underlying hearing, it will be useful, for the purposes of clarity and organization, to first discuss this evidence and then apply it to the various proceedings in issue.

The test as to the sufficiency of the evidence in support of a Commission finding is one of "substantial evidence," which has been defined as "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." Illinois C.R. Co. v. Norfolk & W. R. Co., 385 U.S. 57, 66 (1966); Towne Services Household Goods Transp. Co. v. United States, 329 F. Supp. 815, 822 (W.D. Texas 1971). Furthermore, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

By any standard, the evidence adduced during the course of the administrative proceeding regarding the nature and the extent of AAACon's past conduct was overwhelming in terms of frequency, variety and number. Division 1 essentially found that the evidence demonstrated that AAACon engaged in the following activities:

1) The carrier engaged in a concerted effort to discourage and deny shipper claims and otherwise sought to avoid its motor common carrier responsibilities (R.A. 1804-05).

The evidence of record is replete with instances of claim denials based solely on the ground that the vehicle was mechanically defective (R.A. 494, 552). In addition, there were other instances where AAACon denied claims for the reason that under the bill of lading, payment to the driver by the shipper or his agent constituted conclusive evidence of satisfactory delivery of the vehicle (Record, Vol. 2, TR 335, 525, 559). On the other hand, AAACon also denied claims for the reason that the shipper had not paid the driver. In essence, AAACon denied claims because the retention of the driver's fee for more than seven days after delivery by the shipper constituted full settlement and satisfaction of any claims against AAACon by the shipper (Record, Vol. 3, TR 1049). These denials, moreover, were made with little or no investigation into the merits of the respective claims (R.A., 1805). In fact, the extent of AAACon's investigation of a loss sustained by the Chief of Staff of the U.S. Army's Alaska Command was nothing more than a telephone call (R.A. 1805).

When not engaged in the practice of denying claims out of hand, AAACon made every effort to discourage injured shippers from filing claims. The most glaring example of AAACon's consistent, knowing and deliberate policy of discouraging claims lay with the utilization of a bill of lading which provided for compulsory arbitration of loss, damage or injury claims in New York City, subject to the laws of New York State. The Commission found that the petitioner used this type of clause to "discourage and confuse prospective and actual claimants." (R.A., 1806). Moreover, the wording of the clause was not only designed to lead the shipper to conclude that the potential award was not worth the time and expense of instituting and pursuing an arbitration proceeding in New York City, but, in any event, limited the arbitrator to apply the terms of the bill of lading which provided that retention of any portion of the deposit by the consignee constituted a settlement of the claim.

Ralph Zola--AAACon's claims agent, attorney, Vice-President, and part owner--testified that he could not remember a single instance during the two years prior to his testimony when a shipper claim was actually arbitrated (R.A.,). But, on the other hand, AAACon filed at least 21 suits in New York City courts seeking court orders: 1) staying lawsuits brought by shippers in other jurisdictions outside New York State; and 2) enforcing the arbitration provisions in the bill of lading agreements.

We also note here that this Court has already considered, with apparent approval, this portion of the Commission's decision in another proceeding. In AAACon Auto Transport, Inc. v. State Farm Mut. Ins. Co., 537 F.2d 648 (2nd Cir. 1976) this Court, in the course of finding that AAACon's compulsory arbitration clause was invalid as it constituted a limitation on liability in violation of Section 20(11) of the Interstate Commerce Act (49 U.S.C. §20(11)), stated "We think the language of the Commission [April 7, 1976, order] speaks for itself on the question of whether the arbitration provision complies with Section 20(11). It adds further support to our statutory position that the venue limitation constitutes a limitation of liability and, as such, is invalid." (537 F.2d at 659).

In a similar manner, some of AAACon's New York Office employees used ficticious names - "Bob Maxwell" or "A. J. Baeker" when dealing with claimants. In reality, communications addressed to these "persons" were handled by one of AAACon's employees or lawyers. (R.A. 1556) While the Commission did not decide whether this practice was reasonable, it, nonetheless, found that it was again used in a manner to discourage and confuse claimants (R.A. 1806).

2) AAACon arbitrarily denied claims when the facts available to it were inconsistent with denial. For example, the ALJ found in his initial decision that AAACon settled claims with three of the shippers who testified at the hearings immediately after they gave their testimony notwithstanding the fact that AAACon had knowledge of all pertinent facts relating to their claims for more than a year prior to their testimony (R.A. 1558).

3) The petitioner, wherever possible, attempted to foist responsibility for loss and damages on the shipper's insurance company rather than assume responsibility itself

(R.A. 595). By this action alone, AAACon clearly sought to avoid its responsibilities as a motor common carrier under the Interstate Commerce Act. In essence, petitioner attempted to involve third-party insurance companies who had no connection to the transportation movements in issue. But it is well-established that the explicit language of Sections 20(11) and 219 of the Act place responsibility for loss, damage, or injury to a shipper's property on the carrier and not on an uninvolved third-party insurance company. Ex Parte No. 263, Loss and Damage Claims, 340 I.C.C. 515, 522 (1972).

4) AAACon employed casual drivers without thoroughly investigating and screening their backgrounds. Furthermore, petitioners' failure to properly instruct and control its drivers resulted in excessive abuse of vehicles entrusted to AAACon's care. Notwithstanding the fact that AAACon contended that its drivers were carefully selected and investigated prior to their employment, the overwhelming evidence of record demonstrates that nothing more than a minimal inquiry was made into the backgrounds of its drivers. As a result, AAACon on one occasion actually employed a driver who was being sought by the FBI as a fugitive from justice and who had a past history of convictions for such assorted crimes as auto theft, interstate transportation of stolen motor vehicles, mail fraud, armed

robbery, kidnapping and escape from prison (Record, Vol. 4, TR 1237). This driver, while in AAACon's employ and under the influence of alcohol, was involved in a hit and run accident resulting in personal injury (Record Vol. 4, TR 1223) for which he was sentenced to a total of 15 months in jail (R.A., 1593). In addition, the record is filled with instances of totally unreasonable abuse of the vehicles transported by AAACon. For example, the ALJ found that the driver of one automobile, a 21 year old member of a disbanded rock group, drove the vehicle entrusted to him 700 miles more than the direct route between Los Angeles, California, and Washington, D.C. (R.A. 1566). In another instance, an auto being transported between Carteret, New Jersey, and Yakima Washington, was driven on a frolic of about 1,500 miles (R.A., 1573). In still another situation an automobile was not only driven 1,200-1,500 miles out of the way on a trip between Elberton, Ga. and Denver, Colorado, but was also the apparent cause of a six car accident involving 18 people near Palm Beach, Florida (R.A. 1581). Similarly, other shippers suffered damage to their automobiles because they were abused by AAACon's drivers. Joseph LaFrazia's Corvette was driven at speeds well in excess of 100 miles per hour and sustained clutch, flyweel and throw bearing damage (R.A. 1566). Don Clendenon, a

professional baseball player, arranged to have his car shipped from the New York Met's spring training camp in St. Petersburg, Florida, to Flushing, New York, by AAACon. However, the auto was delivered to Clendenon with stripped gears apparently as a result of jumping from high to low gears at accelerated speeds to brake the car. (R.A. 1577). In the same manner, Mrs. Emily Raze's had to have a new engine installed in her car because it had been operated after a water hose or radiator malfunctioned damaging four pistons. Finally, in one of the most apalling instances of record, Solomon Calusner' sustained $147.97 in damage to his Cadallac because AAACon could not find the keys to his auto of the time of dispatch and, consequently, gave the driver some wire to cross the ignition wires every-time he had to start the car (R.A. 1574).

5) The petitioner led potential shippers to believe that they were completely protected against any damage to their vehicles while in the carrier's custody and that their drivers were bonded or otherwise reliable. Its advertising brochure stated that (R.A. 1555):

> "We fully insure your car for liability in the amount of THREE MILLION DOLLARS, as well as full coverage for all collision damage, including the deductible amount. Our drivers are bonded for the sum of $7,500. All this double protection is in addition to your own insurance and gives you DOUBLE PROTECTION at no additional cost."

In truth, the record demonstrates, however, that while AAACon does maintain a $3 million dollar insurance policy, it is subject to a $1,000 deductible provision. As most claims involved less than that amount, AAACon itself -- not its insurance company -- assumed the responsibility for settling such claims, and, needless to state at this point, consistently and arbitrarily denied them for the reasons set out above. Thus, from the shipper's point of view, AAACon's representation as to its insurance coverage was at a minimum meaningless or to no effect. Similarly, there was no evidence in the record to support the claim that AAACon's drivers were bonded for $7,500, or any other amount (R.A. 1555).

6) AAACon performed transportation services beyond the scope of the authority previously granted to it by the Commission. It is undisputed that AAACon's Sub No. 1 certificate of public convenience and necessity contains a restruction "...against the transportation of any traffic... moving to automobile dealers." Nevertheless, the record clearly shows that on at least 15 occasions AAACon transported vehicles to automobile dealers in violation of the restruction. (Record, Vol. 2, Ex. #81). AAACon, on brief, moreover, appears to concede about 10 of these violations (Petitioner's Brief, p. 40).

We submit the variety, frequency, and number of the activities outlined above and documented by the evidence of record in the administrative proceeding clearly demonstrate that the requirement of "substantial evidence" has been met.

II.

THE COMMISSION'S DISPOSITION OF THE CONSOLIDATED PROCEEDINGS WAS ENTIRELY PROPER IN VIEW OF THE EVIDENCE OF RECORD.

In view of the overwhemling nature of the evidence adduced at the hearing on these consolidated proceedings, we submit that the Commission's disposition of the several matters before it was entirely proper. We now turn to a discussion of each proceeding.

Docket No. MC-C-7287

On the basis of the foregoing discussion little need be said here regarding the resulting cease and desist order issued in Docket No. MC-7287. We believe it is sufficient to state that having found that AAACon was engaged in unjust and unreasonable practices in connection with matters relating to the transportation of automobiles in driveaway service in violation of section 20(11), 219 and 216(b) of the Act, the Commission properly entered a cease and desist order prohibiting AAACon's continued engagement in those activities (R.A. 1812). We further submit that had the Commission not issued such an order, the carrier would still be engaged in the grossly unreasonable activities discussed above - to the obvious detriment of every potential shipper.

Docket No. MC-C-7287 (Sub. No. 1)

In Docket No. MC-C-7287 (Sub-No. 1), the Commission properly denied AAACon's petition for a declaratory order.

The Commission concluded that the restriction contained in petitioner's Sub-No. 1 certificate, restricting the carrier's authority against the transportation of traffic to automobile dealers, was "...clear and unambiguous, [and] serve[d] a useful purpose." (R.A. 1809-10). Consequently, there was no reason to grant AAACon's request for a declaratory order and conclude that the type of movements in question did not come within the purview of the restriction.

It is well settled that the Commission's interpretation of its own certificate will not be overturned by the courts unless found to be arbitrary, capricious or clearly erroneous. Service Transfer Co. v. Virginia, 359 U.S. 171, 177-78 (1959); Andrew G. Nelson, Inc. v. United States, 355 U.S. 554, 558 (1958); reh. den. 356 U.S. 934 (1958); Beeline Express v. United States, 308 F.Supp. 720, 724 (D. Colo. 1970), aff'd 398 U.S. 955 (1970); Pre-Fab Transit Co. v. United States, 306 F.Supp. 1247, 1250 (S.D. Ill. 1969), aff'd 397 U.S. 40 (1970).

Thus, in Transamerican Freight Lines, Inc. v. United States, 258 F.Supp. 910, 919 (D. Del. 1966) the district court pointedly said:

> * * * The function of the Court is not to determine de novo what is a proper construction of a certificate. The Court is bound by the interpretation of the Commission unless it is capricious, arbitrary, constitutes an abuse of discretion, or does violence to some established principle of

> law. Malone Freight Lines, Inc. v. United States, 107 F.Supp. 946, 949 (N.D. Ala. 1952), aff'd per curiam 344 U.S. 925, 73 S. Ct. 497, 97 L.Ed. 712, rehearing denied, 345 U.S. 914, 73 S. Ct. 643, 97 L.Ed. 1348 (1953). Cases to the same effect are legion. These are the principles which must guide us in our review.

Moreover, it is also well established that the principal rule in interpreting a certificate is that the certificate must speak for itself, and the operating rights contained therein must be construed according to their terms regardless of what may have been intended at the time of issuance. Sims Motor Transport Lines, Inc. Revocation of Certificate, 66 M.C.C. 553, 556 (1956), aff'd sub nom., Sims Motor Transport Lines, Inc., v. United States, 183 F.Supp. 113 (N.D. Ill. 1959), aff'd per curiam, 362 U.S. 637 (1960). This is so even though such an interpretation will grant more or less authority than originally requested. American Trucking Association v. Frisco Co., 358 U.S. 133 (1958).

It is only where the language in a certificate is patently ambiguous that the Commission may go behind it and examine the record in order to determine what authority was granted, and the courts will not disregard the Commission's interpretation of an ambiguous certificate unless it is clearly erroneous or arbitrary. Byers Transportation Co., Inc. v. United States, 310 F.Supp. 1120 (W.D. Mo. 1970); Akers Motor Lines, Inc. v. United States, 286 F.Supp. 213 (W.D. N.C. 1968); Adirondack Transit Lines v. United States,

59 F.Supp. 503 (S.D. N.Y. 1944), aff'd, 324 U.S. 824 (1945).

Consistent with these principles, the Commission considered the disputed language and, contrary to AAACon's claim, found the restriction to be unambiguous. In substance, the Commission concluded that while certain movements of leased, repossessed, stolen, or abandoned used automobiles to automobile dealers did not constitute transportation to auto dealers in the usual sense - i.e., new autos - "...the movements were nevertheless to an automobile dealer, in clear violation of the restriction contained in its certificates." (R.A. 1807). We submit, accordingly, that in these circumstances the Commission's interpretation of AAACon's certificate was entirely proper and, consequently, there was no basis for granting its petition for a declaratory order.

Docket No. FF-359

In Docket No. FF-359 the Commission denied AAACon's wholly-owned subsidiary's application for a freight forwarder permit for the reason that the subsidiary failed to establish that it was a qualified applicant or that its proposed operation would be consistent with the public interest and the national transportation policy. The Commission's action was entirely proper.

While the burden imposed on an applicant for freight forwarder authority under Section 410 of the Act to establish it is "qualified" is not as onerous at that imposed on a carrier for motor common carrier authority

under Section 207 to establish its "fitness", the Commission may, nonetheless, consider an applicant's unlawful operations in determining whether it is qualified to receive authority. Hurley Freight Forwarder Application, 285 I.C.C. 704, 709 (1955); ABC Freight Forwarding Corp. Ext. - Massachusetts, 285 I.C.C. 276, 281-82 (1953), aff'd sub nom, ABC Freight Forwarding Corp. v. United States, 125 F.Supp. 926 (S.D.N.Y. 1954), aff'd per curiam, 348 U.S. 967 (1955). Here, the Commission found that as Auto Trip USA, Inc. was a wholly-owned subsidiary of AAACon, controlled by the same directors that controlled AAACon, the activities described above properly related to Auto Trips qualification to operate as a freight forwarder. In essence, the Commission would not permit AAACon to impose a corporate veil between its unjust and unreasonable practices and Auto Trip's application. Accordingly, the Commission reasonably denied Auto Trip's application because it found, based on the overwhelming evidence of record, that Auto Trip was not willing and able to comply with the applicable laws and its rules and regulations promulgated thereunder (R.A. 1809). Certainly, the Commission's decision in this respect was entirely proper and supported by substantial evidence of record.

III.

AAACON'S OTHER ALLEGATIONS ARE WITHOUT MERIT.

In its broadside attack on the Commission's order, AAACon raises several other issues that have no merit.

First, the petitioner devotes a substantial portion of its brief to specific claim situations in a futile attempt to explain away its past misconduct. In so doing, AAACon totally misses the point of the Commission's decision. The Commission simply was not interested in the relative merits of any given claim. As it stated in its report (R.A. 1803):

> As noted above, we are concerned with an examination of AAACon's practices and procedures in order to determine whether it has conducted its operations in a reasonable manner, consistent with its obligations as a motor common carrier under authority issued by this Commission. The relative merits of a particular claim, or its specific resolution is of no significance to our investigation, because it may be due to any number of reasons having little or no relation to the overall reasonableness of AAACon's practices and procedures.

As such, it is clear that the Commission's ultimate decision was not based on the resolution of any particular claims. Rather, it was based on AAACon's overall "....lack of concern, bordering on almost total indifference, for the interests of its customers." (R.A. 1804).

Second, AAACon argues that it relied on the advice of certain Commission employees in transporting automobiles to auto dealers. The substance of the petitioners claim is that it was not proper for the Commission to hold these movements against it inasmuch as the Commission's Section of Motor Carrier's advised petitioner that transportation of this nature would come within the scope of its certificate. Aside from the fact that the employee specifically stated in his letter to AAACon that his opinion was "informal", it is well-established that the Commission is not bound by the informal opinion expressed by one of its employees, regardless of the employee's rank or authority. Thompson v. Texas Mexican R.R., 328 U.S. 134, 146 (1946); Minneapolis R.R. v. Peoria Ry., 270 U.S. 580, 585 (1926). See also, U.S.A.C. Transport, Inc., 235 F.Supp. 689, 693 (D. Del, 1964), aff'd per curiam, 380 U.S. 450 (1965). If AAACon really desired an answer to its question at that point in time, it should have then filed a petition for a declaratory order requesting an interpretation of its certificate. As the record indicates, however, AAACon did not do so until June 21, 1971 - after the Commission had already instituted an investigation into its overall operations on March 18, 1971.

Third, the petitioner generally contends that the cease and desist portion of the Commission's order is totally unreasonable in that it requires "unnatural perfection" from the carrier. The Commission's order requires no such thing. It simply prohibits AAACon from engaging in certain past practices found to be unjust and unreasonable. Indeed, the Commission specifically addressed this issue when it stated (R.A. 1806-07):

> We are, of course, aware that this form of transportation is unique in that the licensed carrier regularly employes so-called "casual drivers" and the commodity transported is actually the mode of transportation. We do not feel, however, that the difficulties inherent in this type of operation justify AAACon's past business practices and procedures. The unique nature of this form of transportation necessitates instead added diligence on AAACon's part in soliciting its prospective drivers and a readiness to accept liability in those instances where its drivers are negligent. We believe that greater care can be exercised at the time the vehicle is tendered to insure that the vehicle is in satisfactory condition, and, although certain mechanical defects will go unnoticed, such obvious problems as defective brakes or improper or defective tires will more easily be spotted. In addition, a record can be made, at the time the vehicle is tendered, of the correct mileage on its odometer so that it can be determined, on delivery, whether the driver has chosen the shortest and most suitable route. Although AAACon and Auto Trip complain that more rigorous standards for driver selection and a more complete inspection of the vehicle when tendered might be so costly as to render this type of operation unprofitable, we do not believe that these or similar changes in its operating procedures will so burden its overall operations as to render its operations unprofitable. The record in this proceeding overwhelmingly demonstrates that the added benefit to the shipping public will outweigh any additional cost.

If anything, petitioner has profited from the windfall revenues it has derived from those practices and operations over the years. Thus, in view of this fact, we submit that AAACon's contention has a distinctly hollow ring.

CONCLUSION

For all of the foregoing reasons, we submit that the Commission's decision in each of the three proceedings involved here was entirely proper. Accordingly, the petition should be dismissed and the relief sought denied.

Respectfully submitted,

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